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NO. 514.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

WILLIE McCARTY, JR., Petitioner

VS.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

Tom N. Goodwin
918 Houston Street
Laredo, Texas 78040

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Attorneys for Willie McCarty, Jr.

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SUPREME COURT OF THE UNITED STATES

October Term, 1966

NO._____

WILLIE McCARTY, JR.

Petitioner

VS

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Willie McCarty, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on June 20, 1967, a copy of which opinion is included in the Appendix hereto.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

Cases

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SUPREME COURT OF THE UNITED STATES

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Petition for Writ of Certiorari to the
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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit sustained the conviction of Petitioner rendered by the Honorable Ben C. Connally, in the opinion above referred to. Subsequent thereto, Petitioner filed a Motion for Extension of Time to File Application for Writ of Certiorari with the Honorable Hugo S. Black, Justice of the Supreme Court of the United States. Said Motion was granted on the 27th day of July, 1967, extending the time for filing this application to August 19, 1967. This Petition is filed within such extended period of time. (Petitioner has been on bond until the issuance of a mandate of the Court of Appeals, at which time he was taken into custody by the United States Marshal and incarcerated in Webb County, Texas jail where he awaits action on his application to have the mandate withdrawn and be released on bond pending the outcome of this petition.)

OPINIONS BELOW

There was no formal opinion of the District Court.

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OPINIONS BELOW

There was no formal opinion of the District Court.

The opinion of the Court of Appeals (Gewin, Thornberry, and Dyer, Circuit Judges) has not yet been reported. It is reproduced in Appendix to this Petition. No motion for rehearing was filed.

STATEMENT OF THE MATTER INVOLVED

Petitioner Willie McCarty, Jr. was arrested on the night of January 16, 1966, on the highway between Freer, Texas and Alice, Texas and a quantity of marijuana was found in his automobile for which he was arrested and subsequently indicted on one count of smuggling into the United States said marijuana in violation of Title 21 U.S.C. §176(a), on a second for transporting and facilitating the transportation of said marijuana, then and there knowing such marijuana to have been imported into the United States contrary to law in violation to Title 21 U.S.C. §176(a), and on a third count for not having paid the transfer tax on said marijuana in violation of Title 26 U.S.C. §4744(a)(2).

At the trial before a jury it was developed that United States Custom Agents knowingly permitted approximately twelve pounds of marijuana to be transported by a paid Government informer, partially under surveillance of said custom officials, from Laredo, Texas to a rendezvous at Freer, Texas, where such informer made delivery to the Petitioner. After the transfer of the marijuana from the Government informer's car to that of Petitioner, said Petitioner was arrested by the watching custom agents.

Petitioner when he took the stand denied he knew he was going to receive marijuana at the time and place in question; that he had been previously approached by the paid Government informer to go into a marijuana "deal", but had refused. He stated he had agreed to engage in a diamond venture with the informer, knowing or highly suspecting that such venture was illicit or illegal in nature. Petitioner emphatically denied that he knew he was picking up

At the trial before a jury it was developed that United States Custom Agents knowingly permitted approximately twelve pounds of marijuana to be transported by a paid Government informer, partially under surveillance of said custom officials, from Laredo, Texas to a rendezvous at Freer, Texas, where such informer made delivery to the Petitioner. After the transfer of the marijuana from the Government informer's car to that of Petitioner, said Petitioner was arrested by the watching custom agents.

Petitioner when he took the stand denied he knew he was going to receive marijuana at the time and place in question, that he had been previously approached by the paid Government informer to go into a marijuana "deal", but had refused. He stated he had agreed to engage in a diamond venture with the informer, knowing or highly suspecting that such venture was illicit or illegal in nature. Petitioner emphatically denied that he knew he was picking up

marijuana from the informer on the night of January 16, 1966, and insisted he believed he was picking up diamonds hidden in some old clothes wrapped in a bundle.

The trial court admitted that but for the absence of knowledge on Petitioner's part that he knew he was picking up marijuana from the Government informer, Petitioner had made out the classic defense of entrapment.

The trial court thereupon withdrew the smuggling count from consideration by the jury, but refused to instruct the jury on defense of entrapment, stating Petitioner's plea of "not guilty" sufficiently protected Petitioner's right before the jury. The jury found Petitioner guilty on the two remaining counts and the trial court sentenced the Petitioner to a period of confinement of five (5) years on the second count of the indictment and a fine of One Thousand ($1,000.00) Dollars, and to a period of confinement of three (3) years on the

third, or tax count, the execution of which he suspended for a period of five (5) years conditioned on the payment of the One Thousand ($1,000.00) Dollar fine within a period of six months, said suspended sentence to begin running upon Petitioner's release from prison.

QUESTION PRESENTED

1. Did the Court of Appeals err in holding that Petitioner Willie McCarty, Jr. was not entitled to have submitted to the jury the instruction on entrapment requested by him?

REASONS FOR ALLOWANCE OF THE WRIT

This case is important in that it underlines the confusion still existing among the Courts of Appeal in determining when the issue of entrapment may be available to defendants. Judge Dyer stated in his opinion in the instant case:

> "Before deciding whether the evidence raised an issue of entrapment we must decide in light of the fact that McCarty denies committing the

acts charged whether he is entitled to raise the "affirmative defense" of entrapment. The government contends that a defendant cannot deny that he has committed the act constituting the offense, as McCarty did here and still rely on entrapment.[2]

"2. The Courts of Appeal are divided on this question. Compare those cases supporting the government's position, Sylvia v. U.S., 1 Cir., 1963, 312 F. 2d 145, cert. den. 374 U.S. 809; U.S. v. Di Donna, 2 Cir., 1960, 276 F. 2d 956; U.S. v. Carter, 7 Cir., 1963, 326 F. 2d 351; Ortiz v. U.S., 9 Cir., 1966, with those contra, Hansford v. U.S., D.C. Cir., 1962 (en banc), 303 F. 2d 219; U.S. v. Bishop, 2 Cir., 1966, 367 F. 2d 806; Crisp v. U.S., 4 Cir., 1958, 262 F. 2d 68, Scriber v. U.S., 6 Cir., 1925, 4 F. 2d 97. Support for the latter cases may be found in Orfield, The Defense of Entrapment in the Federal Courts, 1967 Duke Law Journal 39 (1967) and Note, Entrapment 73 Harvard Law Review 1933 (1960)."

In other words, the Courts of Appeal differ on whether a plea of "not guilty" precludes the "affirmative defense" of entrapment from being asserted.

The conflicting opinions cited by the Court in the instant case reveal the glaring difference in application by the Courts of Appeal of the rule of the two inconsistent pleas and is one which should

be resolved by this Honorable Court.

WHEREFORE Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, commanding the Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court, being the case numbered 23,999 and entitled in its docket at "WILLIE McCARTY, JR., Appellant, v. UNITED STATES OF AMERICA, Appellee," and that the Judgment of the Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated August 16, 1967.

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be resolved by this Honorable Court.

WHEREFORE Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, commanding the Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court, being the case numbered 25,939 and entitled in its docket as "WELLIE McCARTY, JR., Appellant, v. UNITED STATES OF AMERICA, Appellee," and that the judgment of the Court be reversed by this Court and for such other relief as to this Court may seem proper.

Dated August 16, 1967.

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Willie McCarty, Jr.

BRIEF IN SUPPORT OF PETITION

STATUTE INVOLVED

The Federal statute involved is Title 21 U.S.C.A. §176(a) and Title 26 U.S.C.A. §4744(a)(2).

STATEMENT OF FACTS

Counts two (2) and three (3) of the indictment charged the Petitioner with transporting and facilitating the transportation and concealment of marijuana and failing to pay the marijuana transfer tax on such marijuana. Petitioner requested an instruction on the affirmative defense of entrapment which was denied by the trial court and the case went to the jury on a plea of "not guilty" solely.

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By _____
Maria Louisa Green

Attorneys for Petitioner
Willie McCarty, Jr.

THE EVIDENCE

The testimony in the case is conclusive that the paid confidential informer, Sterling Haskins, informed the United States Custom Agents at Laredo that Petitioner would receive a quantity of marijuana from him at Pecks Cafe in Alice, Texas, on the night of January 16, 1966; that he was permitted by Custom Officials to take the marijuana from Laredo, Texas to Freer, Texas, a distance of sixty (60) miles, under Governmental surveillance and where he delivered it to Petitioner, and was paid a sum of money of less than Two Hundred ($200.00) Dollars for his assistance.

Petitioner, in his own defense, testified that he was a married man, father of two children, was a barber by trade in Alice, Texas, had never dealt in marijuana traffic and had been arrested only for speeding and fighting once for which he was fined seventy odd dollars after being no-billed by a grand

THE EVIDENCE

The testimony in the case is conclusive that the paid confidential informer, Sterling Hasking, informed the United States Custom Agents at Laredo that Petitioner would receive a quantity of marijuana from him at Pecks Cafe in Alice, Texas, on the night of January 16, 1960; that he was permitted by Custom Officials to take the marijuana from Laredo, Texas to Freer, Texas, a distance of sixty (60) miles, under Governmental surveillance and where he delivered it to Petitioner, and was paid a sum of money of less than Two Hundred ($200.00) Dollars for his assistance.

Petitioner, in his own defense, testified that he was a married man, father of two children, was a barber by trade in Alice, Texas, had never dealt in marijuana traffic and had been arrested only for speeding and fighting once for which he was fined seventy odd dollars after being no-billed by a grand

jury in Alice, Texas.

Petitioner further testified he had been approached repeatedly by Sterling Haskins, the informer, to go into the marijuana traffic and had steadfastly refused to do so, but that around Christmas time had agreed to advance Four Hundred ($400.00) Dollars to Haskins for the purchase of some diamonds which would double Petitioner's investment overnight on a re-sale. Petitioner testified he knew or suspected that such venture in diamonds was illegal, and that originally all Petitioner had to do was to advance the money. Later, Petitioner testified, Haskins told him he would have to pick up the diamonds at Freer, Texas.

Petitioner denied he knew he was receiving marijuana when he transferred the clothes bundles from Haskins' car to his own at Pecks Cafe in Alice, Texas.

ARGUMENT

Did the Court err in holding that Petitioner was not entitled to have submitted to the jury the affirmative defense of entrapment under the facts developed at the trial?

In Chambers, the Trial Court stated to the attorneys his reason for denying the defensive plea of entrapment (Tr. 268):

> "If he [Petitioner] had said 'I had the marijuana because I was talked into it and induced to do it by the Government agent or by the informer who was working for the Government' you would have had the classic defense of entrapment and, obviously, I would have submitted it to the jury's consideration.
>
> "He didn't say that. He says 'They tried to talk me into it and I wouldn't do it. I was strong. I resisted. He came to me every few days and I said 'No". He talked me into doing something else.'"

Even though having denied committed the offense charged, Petitioner was nevertheless entitled to have the defensive plea of entrapment submitted to the jury.

In Henderson v. United States, 237 F. 2d 169, (5th Cir.); the defendant was charged with and convicted along with his co-defendant of entering into a conspiracy to violate certain sections of the Internal Revenue Code. The conspiracy charged was to distill non-tax paid, or moonshine whiskey.

The defendant admitted to distilling such illegal whiskey but denied knowing of or committing any overt acts of alleged conspiracy and further he was entrapped into committing the illegal acts of distilling non-tax paid whiskey by deputy sheriffs of the county where the offense occurred.

This Court in the Henderson case held that:

> ". . . . according to the circumstances and nature of the case, proof of entrapment may or may not be so contrary or repugnant to proof that the defendant is otherwise not guilty, or rather to a lack of the required proof that the defendant is otherwise guilty, that the proof of one necessarily disproves the other. * * * So here, it seems to us that the defendant could admit operating the illicit still, deny being a party to the conspiracy charged, and still defend on the ground that such overt

acts as he did commit were done as a result of entrapment; he could say, 'I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped.'"

So here Petitioner could say and did admit to entering into an illegal scheme with Haskins, the informer, to pick up and dispose of contraband, deny that he knew the contraband was marijuana, and still say that all the acts he did in connection with Haskins were the result of entrapment.

In Hansford v. United States, 303 F. 2d 219, (D. C., 1962), where defendant denied making sale of narcotics to a special employee using money furnished by a narcotics officer for that purpose, the Court held:

> "We first considered appellant's challenge to the instruction given to the jury on the issue of entrapment. As a minor matter we note that the court stated that the two-fold defense, though permissible, was inconsistent. The defenses were alternative but not inconsistent. It was consistent with defendant's denial of the transaction to ure that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment."

In Crisp v. United States, 262 F. 2d 68 (4th Cir., 1958), the defendant denied making an illegal sale of morphine to government officers, insisting the narcotic was snatched from his hand, and no money was passed. His plea of entrapment was denied. In reversing the case, the Court said:

> "Finding there was ample evidence to support a verdict of guilty, the court then turned to defendant's claim of entrapment and stated 'The record here fails to sustain the defense of entrapment.' Here no issue is raised as to the sufficiency of the evidence to sustain a conviction, and here we find ample evidence justifying submission to the jury of the issue of entrapment. We think it perfectly proper to allow a criminal defendant to submit to a jury alternative defenses. Here, the jury did not believe Alligood's testimony about the agents snatching the morphine from him, but found that he had made a sale of the morphine. We feel under all the evidence of this case that the jury was entitled to go further and determine whether that sale was made pursuant to Alligood's criminal intent or by entrapment."

In United States v. Bishop, 367 F. 2d 806 (2nd Cir., 1966) the court held the defendant was not en-

titled to the defense of entrapment but went on to note the difference of opinion among the various Courts of Appeal:

> "While we need not decide in the instant case whether Bishop's testimony denying the acts alleged to constitute a crime foreclosed the defense of entrapment,[4] we do hold that it was at least incumbent upon him to inform the court or presecution (in the absence of the jury if he so elected), that he was raising entrapment as a defense."
>
> "4. A difference of opinion exists among the various Circuits on this question. Compare United States v. Carter, 326 F. 2d 351 (7th Cir. 1963), and Rodriguez v. United States, 227 F. 2d 912 (5th Cir. 1955), with Hansford v. United States, 303 F. 2d 219, (D. C. Cir. en banc 1962). See in this Circuit, United States v. Di Donna, 276 F. 2d 956 (1960); United States v. Pagano, 207 F. 2d 884 (1953). For the arguments in favor of allowing a defendant to deny the acts alleged to constitute a crime and still raise entrapment as a defense, see Note, "Entrapment", 73 Harv. L. Rev. 1333, 1348 (1960)."

In Gorin v. United States, 313 F. 2d 641 (1963), the United States Court of Appeals, First Circuit, the Court, in footnote 10, page 654, recognizes the

rule in the Henderson case in the following language:

> ". . . However, where there is evidence of governmental inducement, it is not fatally inconsistent for an accused to keep silent in the hope that the jury will not find that the government has proved its case beyond a reasonable doubt, but ask that the jury be charged on the defense of entrapment if it should find the commission of the allegedly criminal acts. The law allows this much inconsistency."

In Rodriguez v. United States, supra, the Court said:

> "[5, 6] Moreover, in refusing to charge the jury on entrapment, the Court stated that the defense was not available where, as in this case, the defendant denies the very acts upon which the prosecution and the defense are necessarily predicated. It is true that this defense may be raised even though the defendant pleads not guilty, but it 'assumes that the act charged was committed', and where the defendant insists, as she did here, that she did not commit the acts charged, one of the bases of the defense is absent. On this ground and for the other reasons mentioned, the District Court was not in error in refusing the appellant's motion or requested charge on entrapment."

In United States v. Carter, supra, the court held:

". . . Moreover, defendant's trial testimony in which he denied the marihuana transaction is inconsistent with a claim of entrapment on that occasion. United States v. Kaiser, 7 Cir., 138 F. 2d 219, 220."

The cases cited above show clearly the differences of opinion on the question held by the Courts of Appeals as stated in the opinion of the instant case and in the Bishop case.

In the instant case, the Court sought to distinguish the Henderson case by saying in the Henderson case there were divisible offenses, i.e., that the defendant could not deny being a member of the conspiracy and yet plead he was entrapped into committing one overt act.

However, that holding is in direct conflict with the holdings in Crisp and Hansford where the defendant denied committing the sole act constituting the offense.

Crisp and Hansford, in turn, are in direct conflict with Sylvia v. United States, 312 F. 2d

145, (1st Cir. 1963), where the defendant testi-
field he did not know what was in a package he sold
to a government agent (and which contained narco-
tics) and requested an instruction on entrapment
by the Government:

> ". . . This testimony, he asserts, warrants a finding of entrapment. We hold it did not, at least in view of the other instructions given to the jury, to the effect that if the government had failed to establish beyond a reasonable doubt that Sylvia knew there was heroin in the packages he did not have 'possession' and could not be convicted. The defendant's testimony was to a single, indivisible episode, and was either to be accepted or rejected in its entirety. The jury's verdict of guilty neccessarily indicated its rejection. There was no basis left, in other words, for a finding of entrapment. This case falls under the settled principle that a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment. United States v. Di Donna, 2 Cir., 1960, 276 F. 2d 956; Rodriguez v. United States, 5 Cir., 1955, 227 F. 2d 912; Eastman v. United States, 9 Cir., 1954, 212 F. 2d 320."

Petitioner submits that, contrary to the state-
ment in the Sylvia case, the principle that a defend-
ant's testimony to the effect that he did not commit

the crime and still raise or be refused a plea of entrapment is very much unsettled.

It makes for an unequal protection of law in the United States.

In further support of the Petitioners contention that the Court erred in denying the defense of entrapment, Petitioner would show that if the holding in this case is permitted to stand the door is opened to far reaching inequities in the mechanics of criminal detection and prevention.

An unscrupulous informer can induce a person otherwise undisposed to commit a violation of the narcotics law to unwittingly do so under the blandishment of the informer that he is participating in a less heinous offense. The Government officials who work with the informer of a necessity must rely on the informer to handle the transaction with the principal involved. The time at and place where the trap is to be sprung, the bait to be used and the inducements

held out to the prospective victim to lead him into the trap are almost entirely in the control of the informer.

Under the holdings and facts of this case, the accused must rely on a plea of "not guilty" without the plea of entrapment made available to him; or else, compounding the predicament into which the Government conniving with the informer has placed him, he must deliberately lie and say - "yes, I knew it was narcotics I was picking up - no, permit me the defense of entrapment."

The danger in the application of the defense on entrapment by those Courts of Appeal who would deny it in such circumstances as in the instant case is a real and apparent one. It breaches the zealous efforts of this Honorable Court to extend to an accused his full and fair rights guaranteed by the Constitution.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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By: Maria Louisa Green
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CERTIFICATE OF SERVICE

This is to certify that on this 16 day of August, 1967, four (4) copies of the above Petition were mailed to the Honorable James Gough, Assistant United States Attorney, Federal Building, P. O. Box 61129, Houston, Texas 77061, and one (1) copy of said Petition was mailed to the Honorable Edward W. Wadsworth, Clerk United States Court of Appeals, Fifth Circuit, Room 408, 400 Royal Street, New Orleans, La. 70130.

Maria Louisa Green

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23999

WILLIE McCARTY, JR.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(June 20, 1967.)

Before GEWIN, THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: McCarty appeals from his conviction by a jury on his plea of not guilty on two counts of an indictment charging respectively transporting and facilitating the transportation and concealment of marijuana in violation of Title 21 U.S.C.A. §176(a) and failure to pay the marijuana transfer tax in violation of Title 26 U.S.C.A. §4744 (a) (2).

The sole issue raised on this appeal is whether the District Judge erred in refusing to give an instruction on entrapment requested by the defendant. We conclude there was no error and affirm.

Before deciding whether the evidence raised an issue of entrapment we must decide in light of the fact that McCarty denies committing the acts charged whether he is entitled to raise the "affirmative defense" of entrapment. The government contends that a defendant cannot deny that he has committed the act constituting the offense, as McCarty did here[1] and still rely on entrapment.[2]

This Circuit has considered this point numerous times. *Beatty v. U.S.*, ... F.2d ...., (Slip Opinion No. 23226, May 2, 1967); *Sears v. U.S.*, 343 F.2d 139 (1965); *Marks v. U.S.*, 314 F.2d 595 (1963); *Henderson v. U.S.*, 237 F.2d 169 (1956); *Rodriquez v. U.S.*, 227 F.2d 912 (1955); *Hamilton v. U.S.*, 221 F.2d 611 (1955); *Siglar v. U.S.*, 208 U.S. 865 (1954).

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1 McCarty testified that he thought a bundle of dirty clothes given to him by one who later turned out to be a government informer contained illicit diamonds and not marijuana and that he had no intention of dealing with marijuana in any way whatsoever.

2 The Courts of Appeal are divided on this question. Compare those cases supporting the government's position, *Sylvia v. U.S.*, 1 Cir., 1963, 312 F.2d 145, cert. den. 374 U.S. 809; *U.S. v. Di Donna*, 2 Cir., 1960, 276 F.2d 956; *U.S. v. Carter*, 7 Cir., 1963, 326 F.2d 351; *Ortiz v. U.S.*, 9 Cir., 1966, with those *contra*, *Hansford v. U.S.*, D.C. Cir., 1962 (en banc), 303 F.2d 219; *U.S. v. Bishop*, 2 Cir., 1966, 367 F.2d 806; *Crisp v. U.S.*, 4 Cir., 1958, 262 F.2d 68, *Scriber v. U.S.*, 6 Cir., 1925, 4 F.2d 97. Support for the latter cases may be found in *Orfield, The Defense of Entrapment in the Federal Courts*, 1967 Duke Law Journal 39 (1967) and Note, Entrapment 73 Harvard Law Review 1933 (1960).

McCarty presses *Sears* and *Henderson* as modifying the rule laid down in the other cases which upheld the government's contention. But the rationale of these two cases also supports the government's position. In both *Sears* and *Henderson* the defendant was indicted for conspiracy and raised the issue of entrapment with regard to a particular overt act. The court held in both cases that the defendant could deny being a party to a conspiracy and yet raise the issue that any overt acts done by him were done because of entrapment. The rationale of these cases was that inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other. *Henderson, supra,* at 173, *Sears, supra,* at 143. In both cases proof that the defendant was not a member of a conspiracy would not have necessarily disproved that he was entrapped into committing a particular overt act. In the instant case, however, proof that McCarty did not commit the acts constituting the sole offense charged necessarily disproves that he was entrapped into doing the offense. We hold this to be too great a degree of inconsistency in defenses to be permitted. *Henderson, supra,* at 1733.[3]

Once on the stand McCarty had a choice: deny the acts constituting the offense or admit that he committed the acts but contend that he was entrapped. Having

[3] Cf. *U.S. v. Di Donna,* 2 Cir., 1960, 276 F.2d 956, where the court in a per curiam opinion held that the trial judge's refusal to instruct the jury on entrapment was proper where the defendant testified much as McCarty did here that he had no knowledge of the contents of the package which he admittedly delivered to the narcotics agent.

elected to deny that he committed the acts charged he was not entitled to an instruction on entrapment. The judgment is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 514

WILLIE MCCARTY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 20, 1967. On July 26, 1967, petitioner filed an application for an extension of time within which to file a petition for a writ of certiorari. On July 27, 1967, Mr. Justice Black extended the time to August 19, 1967. The petition was filed on August 18, 1967. Since the application for an extension was not timely filed, the petition is out of time. Rule 34(2) of the Rules of this Court. There is, in any event, no occasion for further review.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of facilitating the transportation of illegally imported marijuana and transporting untaxed

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marijuana, in violation of 21 U.S.C. 176(a) and 26 U.S.C. 4744 (a)(2). On April 22, 1966 he was sentenced to imprisonment for five years, followed by probation for five years, and fined $1,000. The court of appeals affirmed (Pet. App.).

1. Customs Agent Glazener testified that approximately one week before petitioner's arrest he received information from a reliable informant, Sterling Haskins, that petitioner, who resided in Alice, Texas, would shortly be participating in the transfer of a quantity of marijuana (Tr. 69–71, 93, 96).[1] On January 15, 1966, Haskins telephoned Glazener and stated that the marijuana would be sent to Freer, Texas, between Laredo and Alice, and that petitioner would be proceeding to Freer that night or the next day to receive the shipment (Tr. 32, 69, 96–98). Haskins said that he, personally, would transport the marijuana from Laredo to Freer. Glazener immediately dispatched other agents to maintain surveillance of a restaurant parking lot in Freer, which Haskins described as the place where the delivery to petitioner would be made.

At 6 p.m. on January 16 Haskins advised Glazener that he was about to begin his journey (Tr. 75). Pursuant to their plan, Glazener met Haskins' car on the highway between Laredo and Freer, and followed it to the restaurant parking lot. There he observed Haskins meet petitioner, and remove two paper sacks from the trunk of his car. These sacks, compressed into squares five inches by eight inches, were placed in the

[1] The transcript of trial ("Tr.") has been filed with the Clerk of this Court.

trunk of petitioner's vehicle (Tr. 77–79). The cars left the lot simultaneously, heading in opposite directions. Petitioner's car was pursued and halted two miles southeast of Freer on the road to Alice. After he was "frisked" and a pistol removed from his person, petitioner was asked what he had in the trunk of his car. He replied that the trunk contained only personal belongings (Tr. 82). Petitioner complied with a request to open the trunk. He declared that the two paper sacks which lay therein were filled with dirty clothes (Tr. 83–84).[2] Glazener searched the sacks and found that they contained twelve pounds of marijuana (Tr. 85–87).

2. Petitioner testified that Haskins often frequented petitioner's barber shop, and borrowed small sums of money from him (Tr. 156). He stated that six months before trial, Haskins suggested to petitioner that he could earn a lot of money by trafficking in marijuana. Petitioner rejected Haskins' suggestion (Tr. 150). According to petitioner, Haskins persisted in his efforts to involve petitioner in a transaction involving marijuana, and on two occasions displayed marijuana cigarettes which he encouraged petitioner to smoke. Petitioner, however, continued to refuse to enter into any such venture (Tr. 151–161). Early in December, 1965, Haskins approached him with another idea. Purporting to have a contact in Mexico who could obtain diamonds, Haskins told petitioner that they could be brought into the United States and sold quickly at a 100% profit

[2] At first the petitioner told Glazener that a man in Alice had given him $10 to go to Freer and pick up the bundles of clothes (Tr. 85). He acknowledged at trial that this story was false (Tr. 203).

(Tr. 162). Petitioner at first turned down Haskins' new proposition, but changed his mind three weeks later (Tr. 163). He gave Haskins $400 on January 15, and was told to travel to the parking lot in Freer where he would pick up the diamonds, which would be wrapped in a bundle of clothes (Tr. 163). Petitioner did not desire to take the trip, but, on Haskins' representation that the arrangements which had already been made could not be changed, he agreed to go (Tr. 164). Petitioner thought that the packages placed in his car contained diamonds. While he "had an idea" that such an arrangement, promising to double his money in a short while, might be tainted with illegality, he had no reason to believe that the paper sacks would contain marijuana (Tr. 182, 202).

3. On several occasions during the trial, defense counsel indicated that they would claim entrapment (Tr. 94, 104–108). After all the evidence had been introduced, the trial judge advised counsel out of the jury's presence that he would not give an instruction on entrapment, because petitioner denied committing the offense. Instead, the judge charged the jury that its function was to determine the facts and that it was the "exclusive judge of the credibility of the witnesses and of the weight to be given their testimony" (Tr. 315–316). After reading the underlying statutes and defining such terms as "knowingly," "wilfully" and "with intent to defraud," the court reviewed the testimony of both sides, noting that petitioner's defense was that Haskins had misled him by putting marijuana in his car without his "knowledge or consent or permission" (Tr. 327–330). The court also charged:

You will recall I emphasized a while ago in defining certain terms to you the terminology—and I told you that the defendant was charged here with knowingly and unlawfully transporting and facilitating the transportation of the marihuana. So if the defendant was in fact under the belief that what he had in the back of his car and what he received from Haskins was diamonds or old clothes or anything other than marihuana he would not be guilty of this offense because he is charged with knowingly transporting the marihuana. If you find beyond a reasonable doubt that he had in fact possession of the 12 pounds of marihuana in the trunk of his car on the highway near Freer, as the customs agent told us, and if you find beyond a reasonable doubt that he knew or had good cause to believe that it was marihuana in the back of his car, it would be your duty to convict.

On the other hand, if you believe or have a reasonable doubt that he, in good faith, thought that it was anything else in the back of his car, then he would not be guilty and it would be your duty to acquit. [Tr. 330–331.]

* * * * *

The government, in its argument, argues to you that this story about the diamonds is pure fantasy and fiction dreamed up by the defendant in an effort to avoid the charge of knowingly, wilfully having the marihuana in its possession. The defendant argues to the contrary—they argue that his testimony is credible and worthy of belief and argue that if you have a reasonable doubt as to his knowing and willful pos-

session of the marihuana, you should acquit him [Tr. 334–335].

4. The sole issue raised by petitioner relates to the trial judge's refusal to charge the jury on the defense of entrapment. The court's decision was premised upon a failure of the evidence to warrant such an instruction. Following the rule in the Fifth Circuit, the court held that petitioner could not deny committing the offense charged and plead entrapment.

While, as petitioner points out, courts of appeal differ in their view as to whether an entrapment defense can be raised if the defendant does not admit that he committed the offense charged,[3] there is no occasion to resolve the conflict in this case. The evidence adduced at trial indicated that petitioner was not averse to participating in an illegal transfer. More important, petitioner's testimony, to the effect that he thought he was carrying diamonds, negatives the contention that he was entrapped into carrying marijuana. The issue requiring resolution by the jury was

[3] The majority of circuits hold that entrapment may not be claimed if there is a denial of the commission of the offense: *Martinez* v. *United States*, 373 F. 2d 810 (C.A. 10); *Ortiz* v. *United States*, 358 F. 2d 107 (C.A. 9), certiorari denied, 385 U.S. 861; *United States* v. *Carter*, 326 F. 2d 351 (C.A. 7); *Marko* v. *United States*, 314 F. 2d 595 (C.A. 5); *United States* v. *Pagano*, 207 F. 2d 884 (C.A. 2); *United States* v. *DiDonna*, 276 F. 2d 956 (C.A. 2); cf. *United States* v. *Alford*, 373 F. 2d 508 (C.A. 2); see also *Sylvia* v. *United States*, 312 F. 2d 145 (C.A. 1), certiorari denied, 374 U.S. 809. A contrary position was taken in *United States v. Baker*, 373 F. 2d 28 (C.A. 6); *Crisp* v. *United States*, 262 F. 2d 68 (C.A. 4). A District of Columbia case determined that, under the circumstances therein, the defenses were alternative rather than inconsistent: *Hansford* v. *United States*, 303 F. 2d 219 (C.A.D.C.).

whether petitioner's uncorroborated[4] contention that he had not known that the sacks contained marijuana was believable in the face of the prosecution's proof. The trial judge's charge to the jury was in precise accordance with, and gave full effect to, petitioner's evidence. Since the jury received guidance adapted to the issues as framed, and its verdict is supported by the evidence, further review is not warranted.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioner had subpoenaed the informant, but did not call him to the witness stand at trial.

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